UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

MAU WORKFORCE SOLUTIONS & MERCEDES-BENZ VANS, LLC, as joint and single employers	)	
and	)	**Cases 10-CA-197031**
	)	**10-CA-201799**
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA	)	

MERCEDES-BENZ VANS, LLC AND MAU WORKFORCE SOLUTIONS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND DISQUALIFICATION

Mercedes-Benz Vans, LLC ("MBV") and MAU Workforce Solutions ("MAU") by and through their undersigned attorneys, pursuant to 29 C.F.R. §§ 102.24, 102.36(a), and 102.50, hereby move the National Labor Relations Board (the "NLRB" or "the Board") to dismiss the Complaint for lack of subject matter jurisdiction and disqualification because, for the reasons explained in the recent decisions of *Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017), and *Bandimere v. U.S. SEC*, 844 F.3d 1168 (10th Cir. 2016), Administrative Law Judge Donna Dawson ("ALJ Dawson") does not have the authority to preside over this matter because her appointment violated the Appointments Clause of the United States Constitution. In support of their motion, Respondents' state as follows:

I. INTRODUCTION

Under the Appointments Clause of the Constitution, "inferior officers" must be appointed by the President, the Courts of Law, or by the Heads of a Department. Here, ALJ Dawson -- the

hearing officer assigned to this case -- is an "inferior officer" because her work is directed and supervised by the NLRB and because she exercises significant statutory authority. ALJ Dawson's appointment by the NLRB in July 2014[1] was not, however, in accordance with the Appointments Clause because the NLRB is not a Court of Law nor a Head of Department. Because ALJ Dawson is an "inferior officer" but was not appointed in accordance with the Appointments Clause, her assignment and exercise of authority is unconstitutional and invalidates the proceeding.

II. LEGAL ARGUMENT

A. ALJ Dawson is an inferior officer.

For purposes of the Appointments Clause, a government employee qualifies as an "inferior officer" if he or she (1) performs work that is "directed and supervised at some level by others who are appointed by Presidential nomination with the advice and consent of the Senate," and (2) exercises "significant authority pursuant to the laws of the United States." *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997) (internal citations omitted).

ALJ Dawson meets the first part of the inferior officer test as her work is directed and supervised by the NLRB, whose members are appointed by the "President" with "the advice and consent of the Senate" per 29 U.S.C. § 153(a). *Edmond*, 520 U.S. at 66 ("Whether one is an 'inferior' officer depends on whether he has a superior…whose work is directed and supervised at some level by others."). Here, ALJ Dawson was appointed by the NLRB and her authority is exercised "subject to the Rules and Regulations of the Board." *See* 29 C.F.R. § 102.35(a). ALJ Dawson's recommendations and other decisions are subject to review by the NLRB, which has

[1] https://www.nlrb.gov/news-outreach/news-story/nlrb-officials-ratify-agency-actions-taken-during-period-when-supreme-court citing *NLRB, Minute of Board Action* (July 18, 2014) available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3302/7-18-14.pdf.

responsibility for making a final determination. *See Id*. §§ 101.11-101.12; 102.45, 102.52. Accordingly, because her work is subject to the NLRB's rules and its review and oversight, ALJ Dawson meets the first part of the inferior officer test.

ALJ Dawson also meets the second part of the inferior officer test as she has significant statutory authority. The Supreme Court in *Freytag v. Comm'r* established a three part analysis for determining whether a government employee exercises sufficient authority to qualify as an inferior officer; under this test, an employee qualifies as an inferior officer if (1) he or she is in a position established by law, (2) his or her duties, salary, and means of appointment are specified by statute, and (3) he or she exercises significant discretion in the course of carrying out important functions.[2] 501 U.S. 868, 881-82 (1991) (holding trial judges appointed by the Chief Judge of the Tax Court were inferior officers not appointed as required by the Appointments Clause).

The first prong under *Freytag* is satisfied because NLRB ALJ positions are established by law. *See* 5 U.S.C. § 3105 (2012) (authorizing agencies to "appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [the Administrative Procedures Act]"); 5 U.S.C. 556(b)(3) (portion of the Administrative Procedures Act authorizing administrative law judges to preside over agencies' administrative hearings); 29 U.S.C. § 154 (portion of LMRA directing the NLRB to appoint employees necessary for the proper performance of the NLRB's duties).

The second prong is satisfied because NLRB ALJs' duties, salaries and means of appointment are specified by statute. *See* 5 U.S.C. 556(c) (portion of the Administrative

[2] *Accord Burgess v. Fed. Deposit Ins. Corp.*, No. 17-60579, 2017 WL 3928326, at *3–4 (5th Cir. Sept. 7, 2017) (applying *Freytag* test to find that Federal Deposit Insurance Corporation ALJs were inferior officers); *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1179 (10th Cir. 2016) (adopting *Freytag* test and holding that "[Securities and Exchange Commission] ALJs are inferior officers under the Appointments Clause").

Procedures Act setting forth administrative law judges' powers and duties during hearings); 5 U.S.C. § 557 (portion of the Administrative Procedures Act directing administrative law judges to issue initial decisions to responsible agencies); 5 U.S.C. § 5372 (detailing pay rates and systems for administrative law judges); 5 C.F.R. §§ 930.204-205 (setting forth appointments and pay, respectively, for administrative law judges).

NLRB ALJs also satisfy the third, and final, *Freytag* prong because they exercise significant discretion in carrying out the important function of adjudicating unfair labor practices. ALJs are charged with conducting a "hearing for the purpose of taking evidence upon a complaint [of an unfair labor practice]." 29 C.F.R. § 102.34. In managing a case, they are granted significant authority to:

> administer oaths and affirmations, grant applications for subpoenas, rule upon petitions to revoke subpoenas, rule upon offers of proof and receive relevant evidence, take or cause depositions to be taken whenever the ends of justice would be served, regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question, hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases, dispose of procedural requests, motions, or similar matters… approve stipulations… make and file decisions… call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence, request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies), [and] take any other necessary action authorized by the Board's published Rules and Regulations.

Id. § 102.35 (internal citations omitted). ALJs are also tasked with making credibility determinations and other factual findings and reaching conclusions of law, as explained in the Board's regulations:

> At the conclusion of the hearing the administrative law judge prepares a decision stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues, and making recommendations as to action which should be taken in the case. The administrative law judge may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the

> respondent cease and desist from the unlawful acts found and take action to remedy their effects.

See 29 C.F.R. § 101.11. Such discretion in conducting NLRB hearings is commensurate with the power exercised by the trial judge in *Freytag* who was determined to be an "inferior officer." *Freytag*, 501 U.S. at 881–82 (holding that special trial judges were inferior officers as they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."). Such discretion is also commensurate with the power exercised by other ALJs who have been determined to be "inferior officers." *Burgess*, 871 F.3d at 303 (holding that Federal Deposit Insurance Corporation ALJs were inferior officers after noting the *Freytag* judicial functions and finding that "FDIC ALJs perform all of these functions") (internal citations omitted); *Bandimere*, 844 F.3d at 1179–81 (holding that Securities and Exchange Commission ALJs were inferior officers because they were responsible for, among other things, "taking testimony, regulating document production and depositions, ruling on the admissibility of evidence, receiving evidence, ruling on dispositive and procedural motions, issuing subpoenas, and presiding over trial-like hearings" as well as making "credibility findings" and making "initial decisions that declare respondents liable"). As in *Freytag*, *Burgess* and *Bandimere*, the Board's ALJs exercise significant discretion and are inferior officers for purposes of the Appointments Clause.

B. ALJ Dawson was appointed to the NLRB in violation of the Appointments Clause.

As an inferior officer subject to the Appointments Clause, ALJ Dawson was required to have been appointed by the President, the Courts of Law, or by the Heads of a Department. *See* U.S. Const. art. II, § 2, cl. 2. ALJ Dawson was appointed by the NLRB which is not a Court of

Law or a Head of Department. Accordingly, ALJ Dawson's assignment and exercise of authority is unconstitutional and invalidates the proceeding.

1. <u>The NLRB is not a Court of Law for purposes of the Appointments Clause</u>.

The NLRB does not qualify as a Court of Law. The Supreme Court indicated that Courts of Law, for purposes of the Appointments Clause, include (1) Article III judges and (2) some judges within Article I courts who exercise judicial power. *See Freytag*, 501 U.S. at 890. The NLRB's "members" are not Article III judges or judges who have an "exclusive" judicial role bringing them under the *Freytag* guidance.

NLRB members are not Article III judges. Article III judges are appointed for life while NLRB members hold their term for 5 years. *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (the text of Article III requires that Article III judges "shall hold their Offices during good Behavior" and "receive for their Services[ ] a Compensation[ ] [that] shall not be diminished" during their tenure).

The NLRB members also are not the type of Article I judges contemplated in *Freytag*. In discussing when an Article I court can constitute a "Court of Law", the Supreme Court analyzed the United States Tax Court and stated:

> The Tax Court exercises judicial power to the exclusion of any other function. It is neither advocate nor rulemaker. As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the Internal Revenue Service. It does not make political decisions

Freytag, 501 U.S. at 891. The Court found that the United States Tax Court constituted a Court of Law by noting that the "Tax Court's exclusively judicial role **distinguishes it from other non-Article III tribunals that perform multiple functions** and provides the limit on the diffusion of appointment power that the Congress demands" and finding that including courts "that exercise judicial power and perform **exclusively judicial functions** among the Courts of

Law does not significantly expand the universe of actors eligible to receive the appointment power." *Id*. at 892 (emphasis added) (internal citations omitted).

The NLRB, unlike the Tax Court in *Freytag*, does not perform "exclusively judicial functions" (its orders are not even self-enforcing[3]) but rather performs "multiple functions." *Id.* For example, the NLRB "approves the budget [and] opens new offices" and advocates on behalf of employees as it houses the General Counsel who is charged with "general supervision over attorneys employed by the Board" as well as "the officers and employees in the Regional Offices." Together, these employees are responsible for "on behalf of the Board … the investigation of charges and issuances of complaints" as well as "the prosecution of such complaints before the Board." *NLRB Organizations & Functions, § 202, The General Counsel*. In addition, the NLRB functions as a rulemaker wrestling with political decisions. In fact, the "[Supreme] Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (*citing Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); *NLRB v. Truck Drivers*, 353 U.S. 87, 96, 77 (1957)). Indeed, the Supreme Court has found that "[b]ecause it is to the Board that Congress entrusted the task of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms, that body, if it is to accomplish the task which Congress set for it, **necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions**." *Curtin Matheson*, 494 U.S. at 786, (emphasis added). Finally, a principal responsibility of the NLRB is the "conduct of secret-

[3] NLRB members also do not have the authority of Article III judges. *See e.g., NLRB v. Millwrights Local No. 1102*, 1998 U.S. App. LEXIS 30129 (6th Cir. 1998) ("a Board order is not self-enforcing -- the NLRA does not grant the Board enforcement power."); *NLRB v. Steinerfilm, Inc.*, 702 F.2d 14, 17 (1st Cir. 1983) ("the Board must rely upon the courts to enforce its substantive orders").

ballot elections among employees in appropriate collective-bargaining units to determine whether or not they desire to be represented by a labor organization." *NLRB Organizations & Functions, § 201, The Board*. This is not a judicial function. The NLRB does not qualify as a Court of Law for purposes of the Appointments Clause.

2. <u>The NLRB is Not a Head of Department</u>.

a. *The NLRB is an Agency, not a Department*

The NLRB does not qualify as a Department and, accordingly does not have a "Heads of Department." In *Freytag*, the Supreme Court stated that the "Court for more than a century has held that the term Department refers only to a part of or division a part or division of the executive government, as the Department of State, or of the Treasury, expressly created and given the name of department by Congress" and suggested "[c]onfining the term Heads of Departments in the Appointments Clause to ***executive divisions like the Cabinet-level departments***." *Freytag*, 501 U.S. at 886 (emphasis added) (internal citations omitted). After *Freytag*, the Supreme Court found that the SEC constituted a Department, and noted that "[b]ecause the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Department' for the purposes of the Appointments Clause." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

The NLRB is not a Department named by Congress and is instead an executive agency. Specifically, the Wagner Act created the NLRB as an "agency" to administer the National Labor Relations Act of 1935. *See* 29 U.S.C. § 153 ("The National Labor Relations Board (hereinafter called the 'Board') created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.], is continued as **an agency of the United States** ....") (emphasis added) (internal citations in the original)). Moreover, the NLRB is not listed as a

statutory executive department. *See* 5 U.S.C. § 101 (finding that "[t]he Executive departments are" the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security). Likewise, the United States Government Manual, which lists every U.S. administrative agency and its functions, provides that the NLRB is an ***agency***, not a Department.[4] No Court has ever held that the NLRB is a Department, or that its members qualify as a Heads of Department.

Even if the NLRB was a Department, is it not cabinet-level. The Ninth Circuit explained what qualifies as Cabinet-level like, when it found that the United States Postal Service was Cabinet-level. Specifically, the Court held that "the head of the Postal Service is capable of appointing inferior officers" after finding that "[u]p until its reorganization in 1970, the Post Office Department was in fact a Cabinet-level department" and that its reorganization "into the present United States Postal Service" meant that it "was no longer a member of the Cabinet" but that its reorganization did not "fundamentally change the nature and purpose of the Postal Service," such that the reorganization "did not render what was once a Cabinet-level department into an entity that was not like a Cabinet-level department." *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991). Here, as noted above, the NLRB, unlike the United States Postal Service, was never a Cabinet-level department.

b. *Finding the NLRB is a Department Would Be Inconsistent with the Intent of the Appointments Clause*

Extending Heads of Department to independent agencies like the NLRB is the exact opposite result the framers of the Constitution imagined when designing the Appointments Clause. *Freytag*, 501 U.S. at 884 (noting that "[t]he Constitutional Convention rejected

[4] https://www.gpo.gov/fdsys/pkg/GOVMAN-2016-12-16/xml/GOVMAN-2016-12-16-158.xml.

Madison's complaint that the Appointments Clause did not go far enough if it be necessary at all" by declining to adopt Madison's argument that "Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser office" and instead "limiting the appointment power" so that "they could ensure that those who wielded it were accountable to political force and the will of the people.") (Internal citations omitted). As the Supreme Court noted, "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint" and that "[t]he Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power." *Id*. at 885. Indeed, *Freytag* directed that Heads of Department should be limited to agencies that "are subject to the exercise of political oversight and share the President's accountability to the people." *Id*. at 886. In fact, Justice Scalia, in his concurring opinion in *Freytag*, recognized this danger as he noted that "independent regulatory agencies," like the NLRB, have "heads [that] are specifically designed not to have the quality that the Court earlier thinks important, of being subject to the exercise of political oversight and sharing the President's accountability to the people." *Id*. at 916 (Scalia, J., concurring). For the reasons stated above, the NLRB is not a Department and, accordingly, does not have a Heads of Department.

III. CONCLUSION

As shown above, ALJ Dawson is an inferior officer because she exercises significant statutory authority in conducting hearings and issuing recommendations to the NLRB. As a result, ALJ Dawson, under the Appointments Clause, must have been appointed by the President, the Courts of Law, or the Heads of a Department. She was not so appointed. For this reason, ALJ Dawson does not have jurisdiction to hear this matter.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 27th day of December, 2017:

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